

<p>DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO 109 Eighth Street, Suite 104 Glenwood Springs, CO 81601-3303</p>	<p>DATE FILED: April 19, 2019 5:30 PM FILING ID: D5745349B78DB CASE NUMBER: 2016CW3128</p>
<p>IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS of the CITY OF ASPEN, COLORADO, IN PITKIN COUNTY</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Applicant Cynthia F. Covell, Esq., Reg. No. 10169 Andrea L. Benson, Esq., Reg. No. 33176 Alperstein & Covell, P.C. 1600 Broadway, Suite 1070 Denver, CO 80202 Phone: (303) 894-8191 Fax: (303) 861-0420 cfc@alpersteincovell.com; alb@alpersteincovell.com</p>	<p>Case Number: 2016CW3128 (CA5884, W-791, W-791-77, 81CW063, 85CW045, 89CW030, 95CW187, 02CW19, 09CW145) Water Division No. 5</p>
<p>CITY OF ASPEN'S SUPPLEMENT TO MOTION FOR ENTRY OF FINAL DECREE</p>	

Applicant, the City of Aspen (“Aspen”) through its undersigned counsel hereby submits the following supplement to its unopposed motion for entry of a final decree in this case, as follows:

1. **Rule 121 § 1-15 Certification.** Applicant’s counsel circulated a copy of this Supplement to Motion for Entry of Final Decree together with a copy of the Revised Final Decree dated March 18, 2019 submitted herewith (“Revised Decree”) to Opposers. With the exception of Opposer Larsen Family, LP, none of the opposers object to this Supplement or to entry of the Revised Decree. Opposer Larsen Family, LP objects to paragraph 14 of the Revised Decree.
2. Aspen reached stipulations with all opposers in this case, each of whom stipulated to entry of a decree in the form filed with that opposer’s stipulation, or in a form no less restrictive upon Aspen than the form of decree to which such opposer stipulated. The stipulations were approved by this Court by order dated November 11, 2018.
3. On November 6, 2018, Aspen filed an unopposed Motion for Entry of Decree and submitted a form of decree which each opposer agreed was no less restrictive upon Aspen than the form of decree to which such opposer stipulated.

4. At the Case Management Conference held November 29, 2018, the Court requested additional information.

5. The parties considered various ways to address the Court's request and agreed that Aspen would submit additional information in this pleading. The parties, with the exception of Opposer Larsen Family, LP, also agreed to the form of the Revised Final Decree dated March 18, 2019, submitted herewith.

6. Therefore, Aspen submits additional information in response to the Court's request, and a Revised Final Decree dated March 18, 2019, which contains additional provisions requested by certain opposers. Each opposer, with the exception of Larsen Family, LP, has advised Aspen that the Revised Final Decree dated March 18, 2019 is no less restrictive upon Aspen than the form of decree to which such opposer stipulated.

7. Aspen provides the following additional information to the Court.

- a. Need for Water Right. Aspen needs the Maroon Creek Reservoir water right. *Pagosa Area Water and San. Dist. v. Trout Unlimited*, 170 P.3d 307, 315 (Colo. 2007) (“*Pagosa I*”) states that “[a] governmental agency need not be certain of its future water needs; it may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period.” *Pagosa I* set forth a three-step test for government water providers, such as Aspen, to demonstrate need for a conditional water right, and that test, applied to a diligence proceeding, requires an applicant to do the following: (1) identify a reasonable water supply planning period; (2) utilize substantiated population projections based on a normal rate of growth for that period; and (3) determine the amount of water reasonably necessary to serve the reasonably anticipated needs of the entity for the planning period, considering its other available supplies. *Id.* at 313.
- b. Planning Period and Population Projections. Aspen's need for storage was described in Aspen's study, *Aspen's Water Future: Estimating the Number and Severity of Potential Future Water Shortages* (Headwaters Corporation 2017) (“*Headwaters Report*”), which report was submitted to the Court with the Supplemental Response to the Summary of Consultation.
- c. Amount Reasonably Necessary. Aspen's municipal water system uses surface diversions from Maroon Creek and Castle Creek as its primary source of supply. The Monte Carlo simulation methodology used in the *Headwaters Report*

provided Aspen with a risk assessment tool to identify shortages of water supplies available to meet demand in various future supply and demand scenarios. The Aspen City Council determined that it is prudent and appropriate to plan for a shortage that is statistically likely to occur once in one hundred years, and the *Headwaters Report* determined that the magnitude of such a shortage is 2,279 acre-feet. This constitutes evidence sufficient to meet the *Pagosa I* test.

- d. Storage Needed to Meet Shortage. The report by Aspen's engineering consultants, Deere & Ault Consultants Inc., *Calculation of Storage Demand for the City of Aspen* (December 7, 2017), which was submitted to the Court with the Supplemental Response to the Summary of Consultation, describes their modeling and calculation of the amount of storage required in order to be able to fully meet the planned-for shortage of 2,279 acre-feet. Deere & Ault concluded that the required storage is 8,500 acre-feet.
- e. Intent to Use the Water. Aspen intends to construct the Maroon Creek Reservoir to provide a legal, reliable water supply to its customers. Implementation of other less-costly strategies has heretofore enabled Aspen to operate its municipal water system to provide water service to its customers without construction of the Maroon Creek Reservoir. Studies cited in the *Headwaters Report* state that future climate change impacts on the Colorado River flows will be much more serious than currently assumed, especially if substantial reductions in greenhouse gas emissions do not occur. Aspen intends to develop the Maroon Creek Reservoir water right by constructing a reservoir and using the stored water to provide protection against the uncertainties of future supplies resulting primarily from climate change, and to better assure its ability to provide a continued legal, reliable water supply in the face of climate change and cataclysmic events such as forest fire, avalanche or earthquake.
- f. Capability. As shown in the *Headwaters Report*, water is available to divert the amount of 4,567 acre-feet from Maroon Creek in many years. Aspen has the financial ability to construct a reservoir capable of storing the Maroon Creek Reservoir water right. Aspen is a governmental water provider. Its charter authorizes it to budget for capital expenditures and debt service, to borrow money, and to issue notes as well as general obligation bonds, revenue bonds, local improvement bonds, and other like securities. Aspen is AA+ rated and is able to increase its debt obligation to finance the construction of a reservoir through issuance of governmental or revenue bonds. In addition, the City has a stable population and can finance a portion of the reservoir project through increased

water rates. A portion of the project may also be cash funded through existing reserves.

- g. Limitation on Annual Volume Diverted to Storage. As set forth in the stipulations with opposers in this case, Aspen has agreed to limit the total annual volume of water diverted to storage pursuant to the Maroon Creek Reservoir water right that is the subject of this case, and the Castle Creek Reservoir water right (also originally decreed in CA5884), collectively, to 8,500 acre-feet per year.
- h. Change of Location. After the diligence application was filed in this case, Aspen entered into stipulations with all Opposers. The stipulations include Opposers' agreement to a finding of diligence in this case, and Aspen's agreement to seek to change the place of storage of the Maroon Creek Reservoir water right to one or more new places of storage. Aspen's agreement to change the place of storage of the Maroon Creek Reservoir water right does not prevent a finding of reasonable diligence in this case. An agreement to seek a new place of storage does not detract from its diligence. The conditional water right itself need not be used or developed at the original decreed location, as water rights, including conditional rights, are property rights that may be changed without losing their priority. One of the incidents of a water right is the right to change the place of storage, which is specifically authorized by § 37-92-103(5), C.R.S.

WHEREFORE, Aspen respectfully requests the Court to enter a final decree in this case in the form of the Revised Final Decree dated March 18, 2019, filed herewith.

Respectfully submitted this 19th day of April 2019.

ALPERSTEIN & COVELL, P.C.

By 
Andrea L. Benson, Esq.
Cynthia F. Covell, Esq.

ATTORNEYS FOR APPLICANT CITY OF ASPEN

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2019, a true and correct copy of the foregoing Aspen's Supplement to Unopposed Motion for Entry of Final Decree was served electronically via CCE on the following:

Party	Attorney	Firm	Method
American Rivers	Noto, Paul L. Groves, Jason M.	Patrick, Miller & Noto, P.C.	E-Service
Bd County Commissioners of Pitkin County	Ely, John M. Makar, Laura C. Neiley, Richard Y. III	Pitkin County Attorney	E-Service
Colorado Trout Unlimited	Noto, Paul L. Groves, Jason M.	Patrick, Miller & Noto, P.C.	E-Service
Division 5 Engineer	Division 5 Water Engineer	State of Colorado DWR Division 5	E-Service
Larsen Family LP	Corona, Craig V.	Corona Water Law	E-Service
Roaring Fork Land & Cattle Company	Noto, Paul L. Groves, Jason M.	Patrick, Miller & Noto, P.C.	E-Service
State Engineer	Colorado Division of Water Resources	State of Colorado-Division of Water Resources	E-Service
United States of America	Dubois, James J.	US Department of Justice ENRD	E-Service
Western Resources Advocates	Miller, Bartlett P. Harris, Robert K.	Western Resources Advocates	E-Service
Wilderness Workshop	Miller, Bartlett P. Harris, Robert K.	Western Resources Advocates	E-Service



Stephanie Pierce

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